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Commercial negotiations: The Paris Court of Appeal reminds that the prohibition of significant imbalance is not limited to clauses but extends to practices, the outline of inquiry powers based on the article L. 450-3 of the French Code de commerce and reminds that pretrial judgments having ordered the communication of the non-anonymized minutes of investigations (*ITM Alimentaire International*)

FRANCE, UNFAIR PRACTICES, DISTRIBUTION/RETAIL, DISTRIBUTION AGREEMENT, INVESTIGATIONS / INQUIRIES, PRICES, ADMISSIBILITY (COMPLAINT), JUDICIAL REVIEW, PUBLIC ORDER, GROUP PURCHASING ORGANIZATION, SIGNIFICANT IMBALANCE

Paris Court of Appeal, June 28th, 2023, RG n° 21/16174, ITM Alimentaire International

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Concurrences N° 4-2023 | Alerts | Unfair practices

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Facts. According to the reported ruling, in 2013 and 2014, the DGCCRF conducted an investigation aimed at verifying that the "price war" waged by French distributors against a backdrop of economic crisis and stagnating purchasing power was not accompanied by the imposition of clauses or practices contravening the provisions of Title IV of Book IV of the French Commercial Code, and in particular article L. 442-6 I 2°, abuses having been denounced by ANIA, FNSEA and Coop de France in a joint letter sent to the Prime Minister in June 2014 and published in LSA. The investigation included hearings of 46 suppliers on condition of anonymity, as well as visits and seizures on the premises of one distributor, SAS ITM (hereafter "ITM"). Criticizing ITM for having implemented an " *action and security plan* " drawn up as early as May 2014 and designed to obtain from its suppliers, without any new element arising since the conclusion of the framework contracts on March 1, 2014 and without any consideration, a price reduction in the form of additional (*"additional"*) discounts to compensate for its loss of margin, which characterized an attempt to subject each of its suppliers to a significant imbalance, the Minister summoned ITM. The Paris Commercial Court ruled that the infringement had been committed, and imposed a provisional fine of 2,000,000 euros

on ITM (Paris Commercial Court, July 5, 2023, no. 2015024902). On appeal by ITM, the judgment was essentially confirmed, with the exception of reducing the number of suppliers affected by the practice from nine to five, including Colgate, Henkel and Mondelez.

Problems. The less hurried among our readers will not be able to spare a reading of this interesting and voluminous judgment, with its multiple concerns, some of which may have been reported to the Lettre in other recent cases (e.g. examination of the case under the "criminal" aspect of Article 6 of the ECHR, *à rappr.* Paris, March 15 2023, no. 21/13227 and 21/13481, Lettre distrib. 04/2023, *our obs.*), as we will limit ourselves here to a focus on certain subjects. The first relates to the power of investigators during investigations carried out on the basis of Article L. 450-3 at the premises of a company suspected of implementing prohibited practices, and to the risk of subsequent disclosure of findings made at suppliers due to the vicissitudes of the trial, despite the anonymity measures implemented by the investigators. The second issue, which has been raised many times but is worth recalling, concerns the material scope of application of article L. 442-6 I 2° to simple practices not formalized in writing.

Solutions

– With regard to the investigators' power to hear persons likely to have participated in the commission of an offence, as part of a "straightforward" investigation, the Court of Appeal ruled that " *by carrying out extensive and sometimes tense hearings, including self-incriminating questions, without first informing the persons heard of their rights in such circumstances, on the basis of article L 450-3 of the French Commercial Code, without any need for the inspection being carried out, the DGCCRF officers exceeded their powers. The statements having thus been obtained illicitly, regardless of whether a lawyer was present during the hearings, since the legal framework was inadequate, the production and use in the course of the trial of the minutes recording them are unfair and irreparably infringe SAS ITM's right to a fair trial, since the adversarial discussion does not allow it to usefully contest the content* ".

– There is no discussion of the anonymity of PVs drawn up with suppliers, as the judgment confines itself to mentioning the subject in its presentation of the dispute at first instance. In the words of the judgment, this statement is more informative than a legal solution. Indeed, following an incident of forced production of documents provoked by the defendant, two preliminary rulings " *ordered the Minister to communicate to SAS ITM all the minutes drawn up in June and July 2014 during the survey of 46 suppliers, and then to give SAS ITM's counsel and its legal director, who had previously been bound by confidentiality agreements, access to the non-anonymized minutes, with the exception of information relating to competitors* ". As the first-instance decision is more precise, it should be referred to.

– With regard to the material scope of application of article L. 442-6 I 2° to mere practices not formalized in writing, the Court ruled that " *the imposition of a price cut not formally contractualized may constitute the submission (or attempted submission) to an obligation within the meaning of article L 442-6 I 2° of the French Commercial Code. This interpretation, in line with the letter and spirit of the text, is compatible with the substance of the infringement (...)* ".

We will look at the above topics in the order in which the judgment refers to them.

Observations

1. Scope of article L. 442-6 I 2° and simple practices not formalized in writing. This solution is in line with previous rulings by the same Court. Indeed, the Minister has not failed to add to the debates as many rulings that expressly refer to the sanctioning of practices, distinguished for the occasion from clauses (Paris, Sept. 18, 2013, no. 12/03177; Paris, June 21, 2017, no. 15/18784; Paris, May 16, 2018, no. 17/11187 and Paris, March 15, 2023, no. 21/13227. Rappr. Lettre distrib. 04/2023, aforementioned). In support of this solution, the Court recalls, among other things, Constitutional Council decision no. 2010-85,

which refers to *"the complexity of the practices that the legislator wished to prevent and repress" and recalls that article L. 442-6 of the French Commercial Code is aimed at "the prohibition of abusive commercial practices in contracts", a sign that the former can be expressed in the formation and performance of the latter, to which they cannot be reduced,* [and] *ruled on the intelligibility of the concept of "déséquilibre significatif" and not on the nature and source of the obligations that create it* ". By a *fortiori* reasoning, the judges recall that it is a question of sanctioning by civil liability " *a juridical fact* " and that " *applying equally to the attempted tender, commencement of performance which has by hypothesis failed in its effect, it is clear that the obligation creating the significant imbalance does not have to be formalized in a contract, this analysis not being intended, as SAS ITM maintains, to compensate for a legislative deficiency or contradiction, but to restore the law's coherence in order to guarantee its full effectiveness* ". The author's conduct - a legal fact - takes precedence over the latter's success or, when it proves successful, over the instrumentum, to the extent that the former is punishable even in the absence of the latter: the lack of contractual formalization does not absolve the practice, in the light of the case law of the Paris Court of Appeal, which on this point seems to us to respect the texts. Against this backdrop, the argument, while not impossible to attempt, seemed to be in vain from the outset.

Let's take this opportunity to point out that, with regard to margin compensation, which was one of the practices previously listed in the former article L. 442-6 I 1°, the Court points out that " *the list developed by successive laws was finally abolished by Ordinance no. 2019-359 of April 24, 2019, the purpose of which was not to authorize the practices previously referred to but to "refocus the list of commercial practices around three general practices" (Report to the President of the Republic), a further sign that the addition made in 2014* [adjunction in Article L. 442-6 I 1° of the practice consisting in an additional demand, during the performance of the contract, aimed at maintaining or abusively increasing margins or profitability] *on the prohibition was merely illustrative* ". The lesson is that this type of practice remains prohibited if the conditions for application of article L. 442-1 I are verified in even the most recent disputes.

2. Simple" investigations and the investigators' power to hear persons likely to be accused of committing an offence . The Court, seeing in the enquiries made of ITM staff certain requests which go beyond those provided for in article L. 450-3 C. com. in terms of a "simple" inquiry, limited to the communication of various elements provided for in the text and " *necessary for the control* ", points out that this provision does not confer on the investigators a general power of hearing or search. It is therefore considered that the statements obtained from ITM, in particular by means of precise questions that could sometimes deal with the very characterization of the offence, or even be of such a nature as to encourage self-incrimination, were obtained in an unlawful manner. Their production in the context of the trial, and the PVs recording them, are therefore deemed unfair and irremediably infringe the right to a fair trial. Although the Court refused to annul the PVs in question, as opposed to what was requested in the main proceedings and for lack of a legal basis, the content of which confirmed the reality of the hearings because they " *went far beyond the limited and circumscribed framework of information gathering"* associated with the audit, it considered that *"in view of the nature of the intrinsic defect affecting documents 17 to 22 of the Minister for the Economy, the latter, whose very constitution is unfair in its entirety and which have no probative value, will be declared inadmissible* ". In this case, the investigators may have spoiled their findings, perhaps in an attempt to make them more eloquent *(contra : Paris, March 15, 2023, no. 21/13227 and 21/13481, Lettre distrib. 04/2023, our obs.)*. We have no doubt that, in the future, the latter will be able to draw practical lessons from this in their investigations. However, the Minister's departments were not entirely devoid of evidence, since they had at their disposal, among other things, minutes of *hearings*, but drawn up with suppliers who had been heard.

3. Anonymity of supplier reports. In the wake of the abuses denounced in the trade press, without their perpetrators having been named, the idea that the reports drawn up on 46 suppliers could have been taken into account (which the judgment invites us to guess at, but without any certainty) in order to present to the JLD the request for a "heavy" investigation under article L. 450-4 C. com., carried out at ITM's premises at the end of July 2014, does not seem so far-fetched to us. However, the suppliers were neither the complainants nor the authors of the letter published in LSA, which seems to have triggered the affair. Let's be clear on two points: On the one hand, the principles of a fair trial, including respect for the rights of the defense, must apply to all litigants. Secondly, there is no reason to believe that the investigators were insincere about the anonymity announced to the

suppliers. This being the case, even if the statements were made a long time ago, we can still understand the possible bitterness felt by certain suppliers, who were obliged to cooperate with the investigation and were heard on this occasion in secret, but whose statements were nevertheless, despite the Minister's attempts to the contrary, divulged and taken into account to justify the conviction of their client at the time and probably still today. And this experience on the part of some can lead to apprehension on the part of others about making a full and frank declaration in the context of future investigations, which are nonetheless aimed at combating behaviour that is harmful to the balance and fairness of commercial relations. For observers such as ourselves, the signal given by this ruling is therefore not the happiest in the fight against abusive practices. The *modus operandi* can still be perfected to achieve a story that reconciles the effectiveness of investigations, a fair trial and the effectiveness of the law. Finally, there is much to be said for practical advice to be given to suppliers to avoid jeopardizing investigations designed to protect them, or even their individual actions for restitution, but that's another subject altogether.